Supreme Court, U.S.
FILED
99 47 JUN 22 1999
OFFICE OF THE CLERK

No. 99-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

GABRIEL RUVALCABA
Petitioner,

vs.

CITY OF LOS ANGELES and *DARYL F. GATES*, Chief of Police, in his personal and official capacity etc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR PETITIONER
3435 Wilshire Boulevard, Ste. 2900
Los Angeles, CA 90010
(213) 252-9444

45??

QUESTIONS PRESENTED

1. Where a city police officer, in a "bifurcated" trial, claims that his conduct was objectively reasonable under the Fourth Amendment because he followed city policy and practice, and the jury returns a verdict in favor of the officer, is the plaintiff entitled to go forward on his *Monell* claim against the entity, and to prove that the policy or practice the officer relied on is unconstitutionally unreasonable?

2. Should a city police officer, in a "bifurcated" trial, be permitted to rely on his following city policy or practice to show that his actions were objectively reasonable under the Fourth Amendment?

3. Where a city police officer, in a "bifurcated" trial, relies on his following city policy and practice to show that his actions were reasonable, should the plaintiff be permitted to show that city policy and practice is not reasonable?

LIST OF PARTIES

Petitioner Gabriel Ruvalcaba was plaintiff and appellant in the courts below. Respondents *City of Los Angeles* and *Daryl F. Gates*, chief of police, were defendants and appellees in the courts below. Martin Coon was a defendant in the trial court. He was not a party in the court of appeals. Arthur Sakamoto was a defendant in the trial court, and appellee in the court of appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The District Court Proceedings. 3

B. The Ninth Circuit's Decision. 8

REASONS FOR GRANTING WRIT 9

The Court Should Grant Review To Decide Whether Evidence That An Officer Acted Reasonably Because He Followed Department Policy Exonerates Those Who Set The Policy. 9

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Chew v. Gates,
27 F.3d 1432 (9th Cir. 1994) 4

City of Canton v. Harris,
489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) 12

City of Los Angeles v. Heller,
475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed. 2d 806
(1986) 8, 10, 12

Fagan v. City of Vineland,
22 F.3d 1283 (3rd Cir. 1994) 12

Vizbaras v. Prieber,
761 F.2d 1013 (4th Cir. 1985) 9

Wilson v. Layne,
* U.S. *, 119 S.Ct. 1692, * L.Ed.2d * (1999) 9

Constitution/Statutes

Title 28, United States Code § 1254(1) 2

Title 42, United States Code § 1983 . . . . . 2, 3

U.S. Const., Amend. IV 2

Other Authorities

Barbara Kritchevsky,
Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation,
60 Geo. L. Rev. 417 (1992) 12

Douglas L. Colbert,
Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases,
44 Hast. L.J. 499 (1993) 12, 13

Project,
Suing the Police in Federal Court,
88 Yale L.J. 781 (1979) 11

Telford Taylor,
The Anatomy of the Nuremberg Trial (1992) 13

Appendices

Appendix A–Court of Appeals Opinion
Appendix B–Court of Appeals' Order denying Rehearing Petition etc.
Appendix C–Trial Court Judgment

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

GABRIEL RUVALCABA

Petitioner,

vs.

CITY OF LOS ANGELES and *DARYL F. GATES*, Chief of Police, in his personal and official capacity,

Respondents.

Petitioner Gabriel Ruvalcaba respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on February 5, 1999.

OPINION BELOW

The opinion of the Court of Appeals is reported at 167 F.3d 514. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on February 5, 1999. Apx. A1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March

24, 1999. Apx. B1. This petition for certiorari was filed within 90 days of March 24, 1999. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The District Court Proceedings.

Mr. Gabriel Ruvalcaba sued in district court under 42 U.S.C. § 1983, claiming he was subjected to excessive force during the course of his May 28, 1989, arrest by City of Los Angeles police officers. Defendants were the City of Los Angeles, Police Chief Daryl Gates, and Los Angeles Police officer Martin Coon. Mr. Ruvalcaba claimed that Coon caused or permitted a police dog to attack him,[1] then kicked and struck him when he tried to defend himself against the dog's attack, and that such force was unreasonable. Apx. A6.

The district court severed (or "bifurcated") Mr. Ruvalcaba's claims against Coon form those against the City and Gates. The jury returned a verdict in favor of Mr. Ruvalcaba against Coon. The court submitted a special interrogatory to the jury to determine whether the excessive force resulted from Coon's kicking and striking Mr. Ruvalcaba, or from his "use of the dog," or both. The jury found that the excessive force was due to Coon's kicks and blows only. The district court then dismissed Mr. Ruvalcaba's claims against the City and Gates because of a jury's special finding that Coon's "use of the dog" did not violate Mr. Ruvalcaba's constitutional rights. Apx. A2.

The arrest occurred inside the Mayan Theater, where Mr. Ruvalcaba worked. RT III-20:12-25. Coon received information that someone had complained that Mr. Ruvalcaba had threatened two part time workers with a pipe and locked himself in the theater. RT II-26:19-24; RT III-288:24-289:13. Coon and two other officers

---

[1] The intentionality is the same, since Coon knew the dog was trained to bite whomever it found. RT IV-104:6-13, 105:19-22, 109:19-110:8 (testimony of LAPD's chief dog trainer Yarnall)

entered the theater with Coon's dog and found Mr. Ruvalcaba sleeping in an office. RT III-21:3-10; RT II-17:11-14. Although Coon's dog was trained to automatically bite anyone it found, RT IV-104:6-13, 105:19-22, 109:19-110:8 (testimony of LAPD dog trainer Yarnall),[2] no one gave an announcement of police presence or warning of any type before or during the search, RT II-16:19-17:22, 18:4-8; RT III-292:21-22. When Coon's dog indicated someone was inside the office, without giving any warning Coon let the dog enter the office to attack Mr. Ruvalcaba. RT II 19:11-21:2, RT III-297:4-12 (when Coon's dog indicated person was inside the office, no announcement or warning was given; at no time during the search did Coon give any warning or announcement); RT I 14:18-15:18 (If announcement was given, it was Coon's practice to record fact of the announcement in his report); RT I 17:23-18:1 (in his report regarding Mr. Ruvalcaba's arrest, Coon made no record or notation that an announcement was made).

Mr. Ruvalcaba, laying face up, first became aware of the dog when he felt the dog biting his right lower leg. RT III-22:1-9, 40:19-20. In an attempt to stop the dog's attack, he grabbed the dog and tried to bite it. The dog continued its attack, biting him on his upper right leg and his hand. RT III-22:15-20, 23:7-17, 25:3-9,41:20-25. While the dog was attacking him, Mr. Ruvalcaba heard someone say "Why are you insulting my dog" and felt blows to his head. RT III-22:21-25, 24:13-25. After the strikes to his head, Mr. Ruvalcaba felt two or three blows to his right side ribs which made him feel "suffocated" and unable to move. RT III-25:7-18, 27:11-20, 49:20-

---

[2] LAPD's chief trainer and the person who trained Coon's dog, Sgt. Yarnall (RT IV-85:19-23), testified that the dog was trained to "find and bite," *i.e.*, automatically bite anyone it found, see, e.g., RT IV-105:19-22 (As of May 1989, LAPD dogs were trained to go up to the suspect and bite the suspect unless the dog was called off); *see also Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994) (LAPD dogs trained to bite automatically suspects located by the dogs).

21. The strikes to his ribs were very painful, causing Mr. Ruvalcaba to cry. During this time, he could hear laughter. RT III-26:9-18.

Although Mr. Ruvalcaba could not identify who was present in the office when he was bit and beaten, RT III 49:17-19, the officers conceded that Coon was the only officer present. RT III 297:4-9, 298:8-9 (Coon entered office with his dog); RT II-111:3-11 (Officer Moore admits neither he nor Morales were present in the room where Mr. Ruvalcaba was bitten); RT II-111:24-112:1 (when Moore entered the office, Coon already in the office and next to Mr. Ruvalcaba).

Coon claimed that any injuries Mr. Ruvalcaba suffered were his own fault because he "fought with the dog," while denying that he or anyone else kicked or struck Mr. Ruvalcaba. RT I-2:21-25; RT III-300:25-301:3.

Coon defended his use of the dog by claiming, over plaintiff's objections, that he used the dog in accordance with the policy and practice of the LAPD. RT IV-32:11-23; RT IV-48:16-50:25, 55:14-21, 57:17-22, 58:16-59:8 (LAPD policy discouraged announcements); RT IV 59:21-60:2 (under LAPD policy, dog may be deployed for any "felony" suspect); RT IV 65:18-67:20, 71:7-72:7 (LAPD policy on how dog handler proceeds once he arrives at the scene); RT IV-86:14-88:8 (Coon and his dog were properly certified); RT IV-89:7-14 (LAPD trained Coon on when it would be appropriate for him to let his dog bite).

Furthermore, over plaintiff's objections, Coon defended his actions by presenting evidence that LAPD did not consider releasing the dog a "use of force" because that wasn't the "intent," RT II-27:13-18 (Coon testifies dog attack is not a use of force); RT II-80:16-18, 86:12-18 (per deputy chief, LAPD does not consider a dog attack to be a use of force subject to use of force rules); because

people were bitten so infrequently, RT II-86:12-18 (LAPD dog bites are not considered use of force because such bites are "very unusual"); because the injuries are generally minor, RT IV-101:1-8 (LAPD's "bite and hold" training "minimizes damage" and "generally" results in "one bite").

Besides unsuccessfully objecting to Coon's reliance on departmental policy to defend the reasonableness of his actions, plaintiff unsuccessfully (1) sought a jury instruction that reliance on departmental policy did not necessarily make the dog attack reasonable under the Fourth Amendment. RT V-148:6-18; AER 301; RT V-184:6-186:3;[3] and (2) unsuccessfully sought to introduce evidence that the evidence defendants relied upon to support the reasonableness of their canine policies was untrue.

In particular, to rebut defendants' assertions that LAPD's police dog policy was reasonable, Mr. Ruvalcaba tried to show that LAPD dogs, because of their "bite and hold" training, were *more* likely to cause serious injury than a dog not trained to "bite and

---

[3] Plaintiff's requested instruction stated:

> A police officer may not justify his conduct on grounds that his conduct was in conformity with the policy or practice of his department. The test is whether the force used by the officer is objectively reasonable, not whether the officer used force in compliance with department policy or practice.

AER 301.

The district court recognized that "***there is certainly evidence in the record that would support the giving of such an instruction if it's a correct statement of the law*** . . . ." RT V-149:4-10 (emphasis added), but refused to give the instruction. RT V-184:6-15.

hold" (RT IV-181:5-21; RT V-9:6-10:24); that Coon's dogs attacked, bit and injured over 50 percent of the many people he arrested with the dogs' assistance, that his "use of force" rate (assuming that causing or permitting a dog to attack a person is a "use of force") was more than 2,500 percent higher than officers without dogs (RT X-3:3-4:21 [offer of proof]); that the rate at which he injured scores of people (were he held responsible for the injuries his dogs inflicted) was 10,000 percent higher than other officers (RT X-5:8-23 [offer of proof]); that he seriously injured people (*i.e.*, inflicted injuries requiring in-patient hospitalization) 20,000 percent more often than the average officer (RT X-7:17-8:14); that the 15 LAPD dog handlers year-in and year-out put more people in the hospital by causing or permitting their dogs to attack and bite than the rest of the 7,500-officer LAPD police force combined (RT V-88:18-22); that the suspects bitten were overwhelmingly *not* armed, *not* dangerous, and frequently not guilty of any crime at all (like Mr. Ruvalcaba, who was not charged with any crime) (RT V-63:5-10 [offer of Exhibit 131]; AER 233-34 [Exhibit 131]); and that the canine unit's practices were inconsistent with LAPD's general use of force policy, as well as standards promulgated by California's Commission on Police Officer Standards and Training ("POST")(RT IV 201:3-24, 206:9-16; RT V-63:5-10 [offer of Exhibit 63, POST standards]; AER 227-30 [Exhibit 63], 235 [Exhibit 139]). Because of the court's "bifurcation" order, none of this evidence was permitted.[4]

---

[4] The jury was also not permitted to view a documentary, Exhibit 17, about LAPD's canine program, called "Why Be a Cop." The documentary was produced by LAPD for use in recruiting police officers. It showed that:

> o Permitting an LAPD-trained dog to attack causes officers to lose control of the suspect;
> o LAPD lets its dogs continue to attack and bite even though the suspect is merely trying to protect himself from the dog's attack;

In addition, the trial court excluded evidenced that the overwhelming majority of persons bitten by Coon's dogs -- and especially those seriously injured -- were persons of color. RT X-15:4-16:1 (offer of proof).

B. The Ninth Circuit's Decision.

On appeal, Mr. Ruvalcaba argued that the district court wrongly bifurcated, wrongly permitted Coon to defend his conduct by relying on City policy, wrongly excluded evidence showing the policy was unreasonable, and wrongly refused to permit Mr. Ruvalcaba go forward against the City and Gates. Apx. A11.

The Ninth Circuit agreed that Mr. Ruvalcaba should have been permitted to show that the City and Gates were responsible for the kicks and the blows, but held that – since the jury found that Coon's use of the dog was not unreasonable – the City and Gates could not be held responsible for the use of the dog to attack and bite Mr. Ruvalcaba. Apx. A18-A21. Relying on this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed. 2d 806 (1986), the Ninth Circuit equated the jury's finding that *Coon* did not use excessive force by letting the dog attack as equivalent to a finding that no excessive force was used, and further held that Coon's obedience to his department's policy, *i.e.*, "following orders,"

- LAPD approves ordering or permitting its dogs to attack unarmed, non-resisting (or passively resisting) suspects;
- LAPD approves using its dogs to attack unarmed persons without giving an opportunity to surrender; and
- LAPD approves letting its dogs attack without giving a warning that the dog is going to attack.

The "Why Be a Cop" chillingly demonstrated in a manner that anybody could understand what really happens when an LAPD-trained police dog, is permitted to attack a human.

was *not* a good faith defense. Apx. A18. Hence, on remand Mr. Ruvalcaba could not recover damages for his injuries caused by the department-approved dog attack. Apx. A20.

REASONS FOR GRANTING WRIT

The Court Should Grant Review To Decide Whether Evidence That An Officer Acted Reasonably Because He Followed Department Policy Exonerates Those Who Set The Policy.

Until this Court's recent decision in *Wilson v. Layne*, * U.S. *, 119 S.Ct. 1692, * L.Ed.2d * (1999), there was little guidance and less agreement about what role official policy and practice should play in determining whether an officer's conduct was reasonable under the Fourth Amendment. *See Vizbaras v. Prieber*, 761 F.2d 1013 (4th Cir. 1985) (divided court approves an instruction on qualified immunity allowing the jury to consider the defendants' subjective good faith belief that their conduct was lawful and that they relied in subjective good faith on police department standard operating procedures). In *Vizbaras*, the dissent would have found that "standard police department operating procedures was admissible, but only as a guide to the jury as to what is reasonable under given circumstances, and not to establish defendants' good faith." 761 F.2d at 1019, n.4.

In *Wilson v. Layne*, this Court recognized that an officer's reliance on department policy may entitle him to qualified immunity, but does not make an otherwise unreasonable search constitutionally reasonable:

> Finally, important to our conclusion was the reliance by the United States marshals in this case on a Marshal's Service ride-along policy which

> explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests. The Montgomery County Sheriff's Department also at this time had a ride-along program that did not expressly prohibit media entry into private homes. . . . Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law. But here the state of the law as to third parties accompanying pol..ice on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies.

119 U.S. at *.

The Ninth Circuit's reliance on *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed. 2d 806 (1986), to foreclose Mr. Ruvalcaba's claims for compensatory damages against the City and Gates for the dog bite injuries, demonstrates the need for this Court's review. The panel rejected petitioner's argument that "the jury might have found Officer Coon's actions reasonable because he was following departmental policy," because, according to the panel, *Heller* "flatly rejected such an argument." Apx. A18. While it is true that in *Heller*, as in Mr. Ruvalcaba's case, the jury was not instructed on the qualified immunity defense (Apx. A18), that did not make *Heller* controlling. Mr. Ruvalcaba *objected* to evidence that Coon acted as trained and requested an instruction that training was not a defense, whereas the *Heller* plaintiff *presented* such evidence. 475 U.S. at 803 and n.4 (Stevens, J., dissenting) (testimony of plaintiff's expert, Dr. James Fyfe). Moreover, *Heller* was decided 13 years before this Court's decision in *Wilson v. Layne*, and the record in *Heller* apparently did not raise the issue that where the officer presents evidence that he acted in accordance with department

policy, is that the equivalent of a good faith defense? In that instance, the absence of a separate qualified immunity instruction would be immaterial. Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 800 (1979) (jurors give police "benefit of any doubt" when "acting in the course of his duties").

Heller recognized that if the individuals officer had availed himself of a "defense such as good faith," then exoneration of the individual officer would not necessarily have been inconsistent with a determination of municipal liability. 475 U.S. at 1573. *Wilson v. Layne* recognizes that reliance on department policy would not make an otherwise unconstitutional search reasonable. Here, Coon did avail himself of a "good faith" defense when he presented evidence that his conduct was reasonable because he relied on departmental policy and practice. In addition, Mr. Ruvalcaba explicitly and repeatedly objected to Coon's reliance on departmental policy and practice, unsuccessfully sought a jury instruction informing the jury that reliance on departmental policy and practice did not make Coon's conduct objectively reasonable, and unsuccessfully attempted to introduce evidence that defendants' factual claims regarding the reasonableness of its canine policies and practices were untrue.

Under these circumstances, in contrast to *Heller*, a finding that *Coon's* use of the dog was reasonable can not fairly be equated with a determination that causing or permitting the dog to attack and bite Mr. Ruvalcaba was reasonable under the Fourth Amendment.

- Coon was permitted to and did rely on a "good faith" defense – it was just given a different name: following orders. The jury was entitled to assume that the evidence it heard about how Coon acted in accordance with City policy and practice was relevant to the issues before it, *i.e.*, whether Coon acted reasonably. Why else was such evidence admitted?

- Despite Mr. Ruvalcaba's explicit request that the jury be instructed that following orders did not necessarily make Coon's actions reasonable – and the district judge's recognition that "***there is certainly evidence in the record that would support the giving of such an instruction if it's a correct statement of the law*** . . . " (RT V-149:4-10) -- no instruction was given which would have clarified this important, probably determinative, issue.

- And finally– because of the "bifurcation" order – Coon was permitted to present evidence that the City policies and practices he relied on were reasonable, and Mr. Ruvalcaba was not permitted to show they were not.

Reading *Heller*, as the panel below did, to mean that a jury could and would not exonerate the officer as acting reasonably because he followed his department's policy is, Mr. Ruvalcaba submits, a serious mis-reading of the case.[5] If learned judges find it

---

[5] *See, e.g., Fagan v. City of Vineland*, 22 F.3d 1283, 1292, 1302 (3rd Cir. 1994). (Third Circuit holds that reading *Heller* to mean there must be a finding that line officer who followed department policy committed a constitutional violation in order to hold the municipality liable, would be error. "[A]n improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training."). *See also* Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HAST. L.J. 499, 523 (1993) ("The Supreme Court's holding in *Monell* did not condition a local government's possible liability upon any initial determination that a municipal official or agent had deprived the litigant of a constitutional right."); Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 Geo. L. Rev. 417, 441-42 (1992) ("If municipal liability was proper in *Canton* [*City of Canton v. Harris*, 489 U.S.

reasonable to exonerate officers from liability because they followed their department's policy (*Wilson v. Layne*, *supra*; *Vizbaras v. Prieber*, *supra*), may not a reasonable jury do likewise?

The problem this case raises is a very common one, and not just in litigation against law enforcement agencies. The prevalent defense strategy is to "bifurcate" the trial of the individual actors from that of the entity, and for the individuals to claim, either expressly or by obvious implication, that they acted reasonably because they were just doing what they were trained to do. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HAST. L.J. 499, 552-62 (1993). As the Court recognized in *Wilson v. Lynch*, this is a very attractive argument. It is especially compelling to jurors because "jurors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department policy as an obedient employee," Colbert, *supra*, at 548,[6] and not just because jurors don't even know that employing agencies stand behind their officers to pay whatever damages are awarded, Cal. Gov't Code § 825 (must pay compensatory damages), even punitive damages. *Cornwell v. City of Riverside*, 896 F.2d. 398, (9th Cir. 1990) (Cal. Gov't Code § 825(b) permits public entity to pay

---

378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)], *Heller* cannot mean that exoneration of individual defendants preclude municipal liability.").

[6] United States Nuremberg Chief of Counsel for War Crimes, General Telford Taylor, believed that "Article 8 of the Charter, providing that obedience to a superior's command to commit a crime should be considered only in mitigation . . . is flawed. If the defendant did not know, and had no basis for knowing, that the order he had obeyed was unlawful, the defendant should not be held liable at all." Telford Taylor, The Anatomy of the Nuremberg Trial 630 (1992).

punitive damages for employee). Ironically, had Coon admitted that he kicked and struck Mr. Ruvalcaba to overcome Mr. Ruvalcaba's "resistance" to the dog – in accordance with City policy,[7] the jury probably would have found that "reasonable" as well. The jury likely inferred a consciousness of guilt and hence unreasonableness from Coon's less than candid account of what he did.

Since jurors recognize that police departments are paramilitary organizations, in which police officers are expected to act in accordance with training, they give especially great deference to training given law enforcement officers. The Fourth Amendment's "reasonableness" requirement has been diluted and replaced by a different standard. Instead of determining whether a seizure was objectively reasonable under the Fourth Amendment, jurors are deciding only whether a particular officer acted reasonably in following his training. As a consequence, the "intangible factors" which Justice Stevens feared would make bifurcation "a tactical weapon of great value," *Heller*, 475 U.S. at 807 (Stevens, J., dissenting), are no longer as difficult to see. By the simple expedient of "bifurcation," coupled with reliance on superior orders, the reasonableness and hence constitutionality of Fourth Amendment seizures can and has been effectively insulated from scrutiny.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioner

---

[7] Mr. Ruvalcaba was prepared to prove at trial that LAPD canine unit policy and practice was to beat people with clubs and feet who tried to protect themselves from the dogs' attacks.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

167 F.3d 514; 1999 U.S. App. LEXIS 1589; 99 Cal. Daily Op. Service 990; 99 Daily Journal DAR 1269

GABRIEL RUVALCABA,

Plaintiff-Appellant,

v.

CITY OF LOS ANGELES; DARYL GATES, MARTIN COON, (#21604) in both their personal and official capacities,

Defendants-Appellees.

No. 97-55353

August 6, 1998, Argued and Submitted, Pasadena, California
February 5, 1999, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CV-90-2797-CBM. Consuelo B. Marshall, District Judge, Presiding.

DISPOSITION: AFFIRMED in part, REVERSED in part, and REMANDED.

COUNSEL: Donald W. Cook, Los Angeles, California, for the plaintiff-appellant.

Katherine J. Hamilton, Assistant City Attorney, Los Angeles, California, for the defendants-appellees.

JUDGES: Before: Betty B. Fletcher, Robert Boochever, and David R. Thompson, Circuit Judges. Opinion by Judge Boochever.

OPINION BY: ROBERT BOOCHEVER

OPINION:

BOOCHEVER, Circuit Judge:

Plaintiff Gabriel Ruvalcaba was seriously injured during his arrest and apprehension by a Los Angeles Police Department ("LAPD") canine unit. Ruvalcaba brought this action in federal district court pursuant to 42 U.S.C. § 1983, alleging that he was the victim of excessive force during his arrest, and that his treating physician at the jail dispensary was deliberately indifferent to his serious medical needs. He sued, among others, the City of Los Angeles (the "City"), LAPD Chief Daryl Gates ("Gates"), Officer Martin Coon (the canine officer who arrested Ruvalcaba), and Dr. Arthur Sakamoto (the physician who treated Ruvalcaba at the jail dispensary). The district court severed Ruvalcaba's claims against Officer Coon and Dr. Sakamoto from those against the City and Gates. At the close of the evidence, the district court granted Dr. Sakamoto's motion for directed verdict. The jury then returned a verdict in favor of Ruvalcaba against Officer Coon. The district court dismissed the remaining claims against the City and Gates because of the jury's special finding that Officer Coon's use of the dog did not violate Ruvalcaba's constitutional rights.

Ruvalcaba appeals, seeking to have his claims against the City and Gates reinstated, and the grant of directed verdict to Dr. Sakamoto reversed. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Ruvalcaba was an ex-employee of the Mayan Theater and was living there at the time of his arrest. At approximately 2:30 a.m. on May 28, 1989, Ruvalcaba returned to the theater after a night of heavy drinking and went to sleep in the manager's office. Around 3:00 a.m., Los Angeles Police Officers Moore and Morales responded to a burglary call at the Mayan Theater. They were told by theater employees that an ex-employee had locked himself inside the theater, armed with a pipe and possibly a gun. The officers requested a canine unit.

Standing outside and in front of the theater, Officers Moore and Morales announced themselves as police officers and stated, "The dogs are coming. Give yourself up." The warnings were given in both English and Spanish. The front theater doors were locked with a chain, but the doors could be opened about six to eight inches. The officers stuck their heads through the doors, and announced again in both English and Spanish that the police had arrived and a canine unit had been called. The officers then repeated the same warnings a third time, this time from inside the rear door of the theater.

About an hour later, Officer Martin Coon arrived with his police dog, Smokey. Officer Coon was told by Officers Moore and Morales that they had given several warnings that a canine unit had been called. With no further warning, Officer Coon and Smokey entered the theater through the rear entrance, followed by Officers Moore and Morales. Smokey was unleashed during the search. After searching most of the theater, Smokey alerted near the office where Ruvalcaba was located. Officer Coon opened the door to the office and allowed Smokey to go in, again with no warning that a police dog was present. Officer Coon followed Smokey into the office.

At this point, the stories of Officer Coon and Ruvalcaba differ. Officer Coon testified that as Smokey approached Ruvalcaba, Ruvalcaba, who was on all fours, lunged at Smokey, grabbed him and attempted to fling Smokey into the wall. Ruvalcaba then lost his balance and fell into the desk. The fight lasted only a few seconds. Officer Coon testified that during the entire time of the struggle, he yelled continuously at Ruvalcaba to stop fighting the dog. Officer Coon denied ever kicking or striking, or even touching Ruvalcaba.

In contrast, Ruvalcaba testified that he was sleeping when he awoke to find the dog biting him. Ruvalcaba stated that he tried to fight off the dog by putting his hand into the dog's mouth and biting the dog back. Ruvalcaba stated that he could feel someone striking his head and chest, but could not identify the officer responsible for the blows.

Officer Coon called off the dog after Ruvalcaba was subdued. Moore entered the office to arrest Ruvalcaba and stated that he thought Ruvalcaba was lying on his stomach. When Moore put his knee on Ruvalcaba's chest and started to move Ruvalcaba's hands into proper position, Moore realized that Ruvalcaba was actually on his back. He turned Ruvalcaba over and then handcuffed him. Moore stated that he did not know if he broke Ruvalcaba's ribs when he knelt on him. After a quick pat down, Moore brought Ruvalcaba out of the theater and put him into the squad car. At approximately 5:15 a.m., the police took Ruvalcaba to the Parker Center jail dispensary for medical treatment. Ruvalcaba was moaning, almost incoherent, and complained of severe pain in his chest when Dr. Sakamoto, the treating physician at the jail dispensary, examined him. Dr. Sakamoto failed to take a medical history. He took Ruvalcaba's vital signs, which were normal, and reported that Ruvalcaba's breathing sounds were okay. Sakamoto testified that he routinely would "percuss and oscillate the chest," but there were no notations to that effect on the chart. He also cleaned and sutured two of [illegible] dog bite wounds, which

were on Ruvalcaba's left forearm and thigh. Twelve hours later, Ruvalcaba was unable to get out of bed.

Approximately thirty-six hours after Ruvalcaba arrived at the jail dispensary, he was taken to County General Hospital where Dr. Julia Cameron examined him. At that time, Ruvalcaba had decreased breathing sounds on the right side of his chest, tenderness in the right rib area, and air in the subcutaneous tissue below his right arm. A chest X-ray confirmed that he had two fractured ribs, a collapsed lung, and blood was collecting inside his chest. Eighteen hours later, Dr. Cameron inserted a tube into the chest to collect the blood. Based upon her initial examination, Dr. Cameron noted that the dog bites were not severe but gave Ruvalcaba a prophylactic antibiotic to prevent infection.

Ruvalcaba's expert, Dr. Peter Meade, testified that Ruvalcaba probably fractured his ribs before he entered the jail dispensary. Ruvalcaba's complaints of severe chest pains and his inability to get out of bed were consistent with fractured ribs, because an injury to the chest wall makes it hard to move. Additionally, the lung probably collapsed at the time of the injury.

The defendants' expert, Dr. Michel Leidner, explained that Sakamoto gave appropriate treatment by cleaning and suturing the wounds. He stated that the collapsed lung was not very serious, because Dr. Cameron waited eighteen hours before inserting the tube to drain the blood. He testified, however, that Sakamoto should have taken a medical history.

Sakamoto testified that Ruvalcaba's pain was consistent with the dog bites and inconsistent with fractured ribs because Ruvalcaba's breathing was "okay" and he did not show increased pain as he took a breath. Dr. Cameron testified that the air under the subcutaneous tissue could have developed after the injury.

Ruvalcaba sued Officer Coon and Dr. Sakamoto under 42 U.S.C. § 1983. n1 Ruvalcaba alleged that Officer Coon violated his Fourth Amendment rights by using excessive force in arresting him, and that Dr. Sakamoto violated his civil rights through Dr. Sakamoto's deliberate indifference in treating his serious medical needs. Ruvalcaba also sued the city of Los Angeles and its police chief, Gates, alleging that the LAPD's dog bite policy was unconstitutional. See *Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (providing for municipal liability under § 1983 for injuries caused by the municipality's own unconstitutional or illegal policies).

----------Footnotes----------

n1 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

----------End Footnotes----------

Over Ruvalcaba's objections, the district court bifurcated the claims against Officer Coon and Dr. Sakamoto from the Monell claims against the City and Gates. Because the first phase of the trial would determine only whether Officer Coon used excessive force against Ruvalcaba, the district court precluded Ruvalcaba from offering any evidence to prove the existence of an unconstitutional dog bite policy under Monell. That evidence, the district court concluded, was relevant only to the second phase of the trial in which the Monell liability of the City and Gates would be

determined. If, at the end of the first phase of the trial, the jury determined that Officer Coon did not violate Ruvalcaba's constitutional rights, then Ruvalcaba would have suffered no constitutional injury, and the Monell claims against Gates and the City would be dismissed as a matter of law. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986) (per curiam).

During the pretrial status conference, the district court advised the parties that it needed to resolve some factual issues before it could rule on the issue of Officer Coon's qualified immunity. The district court indicated that it would probably submit special interrogatories to the jury to determine those factual issues.

At the close of the evidence, the district court granted Dr. Sakamoto's motion for a directed verdict. Prior to closing arguments, the district court stated that in an excessive force case, it considered the determination of whether an officer enjoys qualified immunity as essentially the same issue as whether the officer used excessive force. In both instances, the issue is whether the officer's actions were reasonable under the circumstances in light of clearly established law. The parties agreed that a preliminary finding on Officer Coon's qualified immunity was unnecessary, and the district court submitted the excessive force issue directly to the jury using a special verdict. n2

- - - -

MARTIN COON violated the constitutional rights of plaintiff GABRIEL RUVALCABA by using excessive force during his apprehension and arrest on May 28, 1989, under the United States Constitution and 42 United States Code section 1983, as defined in the instructions of this court.

Answer "YES" or "NO."

If the jury answered this question "Yes," it was instructed to answer the following second question:

Was such a violation the proximate cause of injury to plaintiff GABRIEL RUVALCABA as defined in these instructions?

Answer "YES" or "NO."

----------End Footnotes----------

After the parties had completed closing arguments, the district court stated that, in its opinion, all of Ruvalcaba's *Monell* claims alleging an unconstitutional dog bite policy were based solely on Officer Coon's use of the dog, not on Officer Coon's kicking or striking Ruvalcaba. Thus, the court stated that "if the jury should decide excessive force, but [find that] the excessive force is not attributed to the dog or [Officer Coon's] use of the dog, then it seems . . . that we still don't get to the Monell issue." The district court informed the parties that, if the jury found against Officer Coon on the issue of excessive force, the court would then submit special interrogatories to the jury to further determine whether the excessive force resulted from Officer Coon's kicking and striking Ruvalcaba, or from Officer Coon's use of the dog, or both. Only if the jury found that the excessive force resulted from Officer Coon's use of the dog would the district court proceed with the second phase of the trial. There had been no notice given, however, prior to the completion of

closing arguments, that special interrogatories would be submitted to the jury to determine the nature of the excessive force.

Ruvalcaba objected to the special interrogatories as unnecessary, arguing that because Officer Coon's kicks and blows were intended to protect the police dog from Ruvalcaba, those kicks and blows were in furtherance of the dog bite policy. Thus, a jury finding that Officer Coon used excessive force only through kicking or striking Ruvalcaba would not foreclose a finding that the City and Gates were liable under Monell for maintaining an unconstitutional dog bite policy. The district court deferred ruling on the objection and instead directed the parties first to draft the language of the special interrogatories.

After this discussion, the jury returned the special verdict, finding that Officer Coon had violated Ruvalcaba's constitutional rights through the use of excessive force, and that the violation was the proximate cause of Ruvalcaba's injuries. The district court then ruled that it would submit special interrogatories to the jury to determine the nature of the excessive force. The parties eventually agreed to submit the following two questions.

1. Do you find that the excessive force used by Officer Coon was due to his use of the dog?

Answer, yes or no.

Yes No X

2. Do you find that the excessive force used by Officer Coon was due to his having kicked or struck the plaintiff?

Answer, yes or no.

Yes X No

Before the jury returned with answers to the special interrogatories, however, Ruvalcaba objected again. Ruvalcaba argued that because he was informed of the substance of the special interrogatories only after closing arguments were completed, he was effectively precluded from making arguments and offering evidence addressing those special interrogatories. Ruvalcaba also objected on the grounds that the special interrogatories required the jury to reach a unanimous decision on "which blow or kick or bite was excessive." The district court overruled the objections, stating that Ruvalcaba was never foreclosed from making any relevant arguments or offering relevant evidence, and that requiring the jury unanimously to determine the source of the excessive force was proper.

The jury returned the special interrogatories finding that the excessive force was due to Officer Coon's kicks and blows, but not the use of the dog. The district court concluded that, under Heller, Ruvalcaba had suffered no constitutional injury from Officer Coon's actions under the dog bite policy, thereby absolving the City and Gates from any liability under Monell. The district court then dismissed the claims against the City and Gates. In determining the damage liability of Officer Coon, the jury awarded Ruvalcaba $ 60,400 in compensatory damages, and $ 5,000 in punitive damages.

Ruvalcaba appeals, seeking to have his claims against the City and Gates reinstated, and the grant of directed verdict to Dr. Sakamoto reversed. All parties agree that any and all claims against Officer Coon arising out of this incident have been fully satisfied. Thus, the only defendants remaining on this appeal are the City, Gates, and Dr. Sakamoto ("defendants").

II. DISCUSSION

A. Standing to Appeal and Article III Jurisdiction

The bulk of Ruvalcaba's appeal alleges numerous errors committed by the district court before and during the liability phase of the trial against Officer Coon and Dr. Sakamoto. The defendants argue that because Ruvalcaba has accepted payment in full of the judgment entered against Officer Coon, he lacks standing to appeal any issues that seek to revisit Officer Coon's liability. Specifically, the defendants argue that Ruvalcaba lacks standing to appeal the following issues: whether the district court erred by (1) allowing Officer Coon to rely on and present evidence supporting a "superior orders" defense; (2) refusing to instruct the jury that following orders is not a defense; (3) precluding Ruvalcaba from offering evidence to challenge Officer Coon's characterization of the City's dog-bite policy; (4) precluding Ruvalcaba from presenting any evidence on the risk of death or serious injury from police dog attacks in general; (5) precluding Ruvalcaba from arguing or instructing the jury that siccing the dog on him was deadly force; (6) denying Ruvalcaba's motions for judgment as a matter of law and directed verdict that siccing the dog on him was per se unreasonable; (7) excluding the "Drameco Kindle" videotape depicting a LAPD police dog attack in a separate incident; and (8) refusing to instruct the jury that warnings should be given where feasible. Ruvalcaba's claim that the district erred in bifurcating the trial and conditioning the liability of the City and Gates exclusively on Officer Coon's use of the dog also falls into this category.

Any finding of error on these issues, the defendants argue, would necessarily result in a reversal of the entire judgment, not just that portion adverse to Ruvalcaba. Ruvalcaba counters that the district court's errors prevented the jury from finding that Officer Coon's use of the dog constituted excessive force, which in turn

resulted in the dismissal of Ruvalcaba's claims against Gates and the City.

A prevailing party usually may not appeal a decision in its favor. In an appropriate case, however, a prevailing party may appeal a collateral adverse ruling. *Electrical Fittings Co. v. Thomas & Betts Corp.*, 307 U.S. 241, 242, 83 L. Ed. 1263, 59 S. Ct. 860 (1939); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980); *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994). If the adverse ruling can serve as the basis for collateral estoppel in subsequent litigation, the prevailing party has standing to appeal. *Good Samaritan Church*, 29 F.3d at 489.

The district court's order dismissing Ruvalcaba's claims against the City and Gates was a ruling on the merits, and collaterally estops Ruvalcaba from pursuing these claims in the future. Thus, to the extent that Ruvalcaba is a prevailing party appealing from an adverse ruling, Ruvalcaba has standing to appeal any issues resulting in the dismissal of his Monell claims. That does not end our jurisdictional analysis, however. We must also determine whether Ruvalcaba's claims are moot.

"Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 (9th Cir. 1998); *Deakins v. Monaghan*, 484 U.S. 193, 199, 108 S. Ct. 523, 98 L. Ed. 2d 529 (1988). If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction. *See Ruiz*, 160 F.3d at 549; *Deakins*, 484 U.S. at 199; *Chew v. Gates*, 27 F.3d 1432, 1437 (9th Cir. 1994); *Sea-Land Serv., Inc. v. International Longshoremen's & Warehousemen's Union*, 939 F.2d 866, 870 (9th Cir. 1991).

The remedy that Ruvalcaba seeks on appeal is the reinstatement of his claims against the City and Gates. A subset of the issues he raises relate only to the jury's determination of liability against Officer Coon and not to the derivative liability of the City or Gates. Ruvalcaba asks this court to vacate the jury's finding that Officer Coon's use of excessive force was not the result of his use of the dog. He seeks a remand for a new trial only on that factual issue, while at the same time asking us to affirm the jury's other factual finding that Officer Coon's kicks constituted excessive force. Even if we were able to remand solely for a new trial on the issue whether Officer Coon's use of the dog constituted excessive force, we are foreclosed from doing so. All the parties agree that Ruvalcaba's acceptance of payment in full of the judgment against Officer Coon settles all issues against Officer Coon and no further claims arising from this incident may be brought against him. Thus, the issue of whether Officer Coon's use of the dog constituted excessive force has been fully litigated, and the doctrine of res judicata precludes Ruvalcaba from reopening that issue on remand. *See Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993) (listing requirements of res judicata).

We hold that Ruvalcaba's appeal, to the extent it raises issues relating only to Officer Coon's liability on use of the dog, is moot for lack of an available remedy, and we lack Article III jurisdiction over those claims.

We further address, however, Ruvalcaba's remaining claims concerning the dismissal of his claims against the City, Gates and Dr. Sakamoto.

B. The Special Interrogatories

Ruvalcaba asserts that submission of the special interrogatories constituted error for two reasons. First, Ruvalcaba was not informed

of the substance of the special interrogatories prior to closing arguments, and therefore could not tailor his arguments around those questions. Second, the special interrogatories were used improperly by the district court because the court erroneously assumed that Officer Coon's kicks were not in furtherance of the City's dog bite policy. Ruvalcaba argues that he was prejudiced by this error because the district court relied on the answers to the special interrogatories to dismiss Ruvalcaba's claims against the City and Gates.

1. Failure to Inform Counsel of the Substance of the Special Interrogatories Prior to Closing Arguments

The decision "whether to submit special interrogatories to the jury is a matter committed to the discretion of the district court." *Acosta v. City & County of San Francisco*, 83 F.3d 1143, 1149 (9th Cir.), cert. denied, 117 S. Ct. 514 (1996). Accordingly, we review for an abuse of discretion the district court's decision to inform the parties of the substance of special interrogatories after closing arguments. *See Binder v. Long Island Lighting Co.*, 57 F.3d 193, 199 (2d Cir. 1995); *Sakamoto v. N.A.B. Trucking Co.*, 717 F.2d 1000, 1006 (6th Cir. 1983).

This court has not yet decided the specific question of when a district court must disclose the substance of special interrogatories to the parties. It has, however, addressed the similar question of when the substance of a special verdict must be disclosed. In *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365 (9th Cir. 1987), this court stated, in dictum, that "the form of the [special] verdict should be decided before closing argument so that counsel may structure their arguments, and the court its instructions, accordingly. The failure to follow this practice may constitute reversible error." *Id.* at 1374 (citations omitted). *Landes* cited *Sakamoto v. N.A.B. Trucking Co.*, *supra*, and *Smith v. Danyo*, 585 F.2d 83 (3d Cir. 1978), both of which present facts similar to those presented in this

appeal.

In *Sakamoto*, the district court submitted a special interrogatory to the jury after counsel had finished their closing arguments, and without previously advising the parties that it was doing so. *Sakamoto*, 717 F.2d at 1004. The additional question was needed to determine whether punitive damages would be available in the damages phase. The Sixth Circuit stated:

> We consider it the better and safer practice . . . for the trial court to submit the actual special interrogatories and supplemental instructions to counsel in writing in advance of argument. But we hold that the disclosure prior to final argument of at least the substance of the . . . special verdict interrogatories and supplemental instructions is mandatory.

Id. at 1006 (emphasis added). The court held that the failure to disclose the substance of the special interrogatory to the parties was an abuse of discretion. *Id.* at 1007. The court also held, however, that the error was harmless because the defendants were otherwise aware of the issue contained in the special interrogatories and could not claim to have been surprised by it. Id. The Second Circuit agrees with the position taken by the Sixth Circuit. *See Binder*, 57 F.3d at 199 ("it is the better practice under Rule 49(a) to submit special interrogatories to counsel prior to summation" (quotations omitted)).

In *Smith v. Danyo*, *supra*, the Third Circuit went further than the Sixth Circuit in holding that both the form and substance of special interrogatories must be disclosed to the parties prior to summation. Smith stated that the exact wording of special interrogatories is very significant, and "counsel should know it before they have their last opportunity to address the jury." *Smith*,

585 F.2d at 88. The *Smith* court held that "the practice of depriving counsel of the opportunity to see and comment upon special verdict interrogatories prior to their closing argument" was an abuse of discretion. *Id.* Like *Sakamoto*, however, *Smith* held that any error was harmless because the failure to disclose the special interrogatories prior to closing arguments was not prejudicial. *Id.*

We now expressly hold that a district court shall disclose at least the substance of special interrogatories before closing arguments have been completed. Further, while we agree that it is "the better and safer practice . . . for the trial court to submit the actual special interrogatories . . . to counsel in writing in advance of argument," *Sakamoto*, 717 F.2d at 1006, whether that failure results in error will depend on the nature of the questions in the particular case.

In this case, the parties were not told prior to closing arguments that special interrogatories would be used to determine the nature of the excessive force. The fact that both parties participated in drafting the final language of the special interrogatories is irrelevant because the drafting took place after closing arguments. At that point, counsel no longer had the opportunity to "'plan an effective argument whose objective is to translate persuasion into specific decisive action by the jury.'" *Sakamoto*, 717 F.2d at 1005 (quoting *Clegg v. Hardware Mut. Cas. Co.*, 264 F.2d 152, 157 (5th Cir. 1959)).

Ruvalcaba argues on appeal that had he been given notice of the substance of the special interrogatories prior to his argument to the jury, he would have argued that all of the force used by Officer Coon - both the kicking and the siccing of the dog - was the result of an unconstitutional dog bite policy. The district court ruled that despite the lack of notice, Ruvalcaba was never precluded from arguing his theory to the jury, and the district court would not

speculate as to whether Ruvalcaba in fact would have done so. That, however, misses the point. Knowledge of what issues the special interrogatories would address was necessary to allow Ruvalcaba to shape his closing argument. We hold that the district court abused its discretion by failing to inform the parties of the substance of the special interrogatories prior to closing arguments.

Given the record before us, however, we find that the error did not result in any prejudice to Ruvalcaba. First, it is not clear that Ruvalcaba did not actually make the arguments he asserts were precluded by the error. During his closing argument, Ruvalcaba made several references to the fact that Officer Coon kicked Ruvalcaba in order to protect his dog. Second, the argument that both the kicks and dog bites were the result of the city's dog bite policy would not have affected the jury's answers to the special interrogatories. The questions themselves do not assume that the City's and Gates' liability depends on a finding that excessive force was due to the use of the dog. The special interrogatories simply ask what acts constituted the excessive force, independent of whether the dog-bite policy gave rise to those acts. Whether both types of force used by Officer Coon - the kicking and the siccing of the dog - were the result of the dog bite policy is a separate issue concerning the district court's interpretation of the answers to the special interrogatories.

Ruvalcaba needed to convince the jury that Officer Coon's use of the dog on Ruvalcaba was unreasonable, and he argued as much throughout his entire summation. Although the jury found against him on that issue, the result was not affected by the district court's decision to submit the special interrogatories without providing notice of their substance to the parties prior to summation. Rather, the prejudice arose from the district court's interpretation of the special interrogatories, which we address below.

Because Ruvalcaba was not prejudiced by the district court's failure to notify counsel of the substance of the special interrogatories until after summations, we hold that the error was harmless.

2. Dismissal of Claims Against the City and Gates

Ruvalcaba alleges that the district court erred in dismissing Ruvalcaba's *Monell* claims based on the incorrect conclusion that Officer Coon's kicks and blows were not the result of the City's dog bite policy. He first argues that the special interrogatories did not decide the issue whether he suffered constitutional injuries due to Officer Coon's use of his dog, because the jury might have found Officer Coon's actions reasonable because he was following departmental policy. The Supreme Court, however, has flatly rejected such an argument:

> The difficulty with this position is that the jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer. Respondent contends . . . that even though no issue of qualified immunity was presented to the jury, the jury might nonetheless have considered evidence which would have supported a finding of such immunity. But the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them, and that they do not consider and base their decisions on legal questions with respect to which they are not charged.

Heller, 475 U.S. at 798 (citation omitted). In this case, as in *Heller*, the jury was not instructed on qualified immunity or good faith, and

is presumed not to have based its decision that Officer Coon's use of the dog did not constitute excessive force on those grounds. *Id.*

Second, Ruvalcaba argues that because all the force used by Officer Coon was the result of the City's dog bite policy, he should be able to pursue a Monell claim based upon the jury's finding that Officer Coon used excessive force by kicking and striking Ruvalcaba. In his amended complaint, Ruvalcaba alleged as unconstitutional the LAPD's policies of: training canine officers to strike suspects who resist the dog attacks, improperly selecting officers prone to excessive force to become canine officers, and inadequately training canine officers to limit the amount of force they use. That is, Ruvalcaba argues that he sufficiently raised an issue of fact whether there was a connection between the City's dog bite policy and Officer Coon's striking and kicking Ruvalcaba. The district court disagreed.

We believe that Ruvalcaba sufficiently established issues of fact whether Officer Coon kicked Ruvalcaba in an attempt to protect the police dog, and whether the kicks were in furtherance of the City's dog-bite policy. Thus, we hold that the district court erred by dismissing the claims against the City and Gates based on the jury's answers to the special interrogatories. We remand to the district court to reinstate those claims against the City and against Gates, in both his official and individual capacities. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 We treat the claim against Gates in his official capacity as one against the City. As the Supreme Court has stated, "official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) (internal quotation marks omitted). "As long as the government entity receives notice and an opportunity to respond, an

official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* at 166.

----------End Footnotes----------

We note that Ruvalcaba's victory may be a hollow one because on remand, he may no longer seek compensatory damages. Such damages are unavailable because Ruvalcaba has already been fully compensated for his injuries attributable to Officer Coon's kicks and blows. No compensatory damages were awarded for Ruvalcaba's dog bite injuries because the jury found that they did not result from the use of excessive force. The fact that Officer Coon's kicking may have been the result of an unconstitutional dog-bite policy does not change the jury's finding, and would not justify allowing additional damages for the dog bites.

Ruvalcaba cites *Chew* for the proposition that he can still recover damages from the City and Gates because he has not been compensated for his dog bite injuries. Like this case, *Chew* involved claims that an officer had used excessive force both by kicking the plaintiff and through his handling of the dog. *Chew*, 27 F.3d at 1436. *Chew* involved a general finding of excessive force, however, so it was not clear whether the award of damages was compensation for the injuries from the dog bites or the kicks. *Id.* at 1437-38. Here, it was clear from the jury's answers to the special interrogatories that the jury awarded damages to Ruvalcaba only for his kicking injuries because only the kicks constituted the excessive force. Ruvalcaba has already been fully compensated for his kicking injuries, and the "one-satisfaction rule . . . preclude[s Ruvalcaba] from seeking a further monetary award from the remaining defendants for those injuries." *Id.* at 1438.

Even though Ruvalcaba has been fully compensated for his injuries, he may still recover nominal damages for a "separate and

distinct [constitutional] wrong" irrespective of whether he is entitled to actual damages for that wrong. *Larez v. City of Los Angeles*, 946 F.2d 630, 640 (9th Cir. 1991). Punitive damages are unavailable as a matter of law. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981).

On remand, however, with respect to Ruvalcaba's claim against Gates, in his individual capacity, Ruvalcaba would be free to seek both nominal and punitive damages. *Smith v. Wade*, 461 U.S. 30, 35-36, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1982). If Gates is entitled to qualified immunity, summary judgment in his favor would be appropriate. *See Siegert v. Gilley*, 500 U.S. 226, 231-32, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991); *Chew*, 27 F.3d at 1446. We should note that the events in this case occurred in May 1989. In *Chew*, this court held that, as of September 1988, the law was not established sufficiently clearly to prohibit the use of dogs to search for and bite unarmed suspects. *Id.* at 1447.

In sum, we reverse the district court's order dismissing the claims against the City and Gates. We remand for determination whether the City, and Gates in his official and individual capacities, adopted and maintained a policy of training and using police dogs in an unreasonable manner. Because Ruvalcaba has already been fully compensated for his injuries, he may recover only nominal damages against the City and against Gates in his official capacity. Ruvalcaba is free on remand, however, to pursue both nominal and punitive damages against Gates in his individual capacity, in the event that Gates is not qualifiedly immune.

C. Dr. Sakamoto

Ruvalcaba argues that the district court erred by granting Dr. Sakamoto's motion for judgment as a matter of law. In order to succeed on a section 1983 claim for inadequate medical treatment,

Ruvalcaba must demonstrate that Dr. Sakamoto showed "deliberate indifference to [Ruvalcaba's] serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). Further, the deliberate indifference must be both "purposeful," *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), *overruled on other grounds, WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997), and "substantial" in nature. *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986).

The evidence of Dr. Sakamoto's treatment of Ruvalcaba reveals facts from which a jury could find several omissions and errors. Dr. Sakamoto failed to take Ruvalcaba's medical history, which likely would have revealed that Ruvalcaba had suffered a chest injury. Dr. Sakamoto's failure to diagnose Ruvalcaba's broken ribs caused a thirty-six hour delay before Ruvalcaba was treated, resulting in Ruvalcaba suffering a significant amount of pain. Although such errors may support a finding that Dr. Sakamoto was negligent, the facts do not support an inference that Dr. Sakamoto acted purposely with deliberate indifference. *See McGuckin*, 974 F.2d at 1060. The district court therefore did not err in dismissing Ruvalcaba's claim against Dr. Sakamoto.

D. Equal Protection Claim

Ruvalcaba contends that the district court erroneously excluded evidence necessary to support his race discrimination claim. The district court dismissed that claim after Ruvalcaba indicated that "we are not going forward with that count." Ruvalcaba reiterated that position during the discussion over jury instructions. Because Ruvalcaba dropped this claim, the district court did not abuse its discretion in excluding the evidence.

III. CONCLUSION

We AFFIRM the district court's grant of Dr. Sakamoto's motion for judgment as a matter of law. We also AFFIRM the district court's exclusion of evidence relating to Ruvalcaba's equal protection claim. We find that it was error not to disclose the substance of the special interrogatories until after closing arguments, but find that this error was harmless. We conclude that the district court's ruling that Officer Coon's kicks were unrelated to the City's dog bite policy was erroneous, and the district court should not have dismissed Ruvalcaba's claims against Gates and the City. We thus REVERSE the order dismissing those claims and REMAND to the district court to reinstate them to allow Ruvalcaba to pursue nominal damages against the City and Gates in his official capacity, and both nominal and punitive damages against Gates in his individual capacity. We dismiss as moot Ruvalcaba's remaining claims alleging errors committed by the district court relating to Officer Coon's liability.

The parties shall bear their own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL RUVALCABA

Plaintiff-Appellant,

vs.

CITY OF LOS ANGELES; DARYL GATES, MARTIN COON, (#21604) in both their personal and official capacities,

Defendants-Appellees.

No. 97-55353

D.C. No. CV-90-2797-CBM

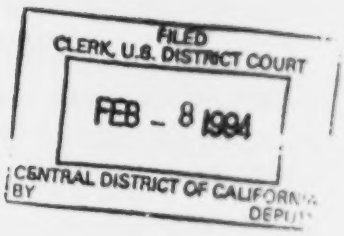
ORDER

Before: FLETCHER, BOOCHEVER, and THOMPSON, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and recommends rejection of the suggestion for rehearing en banc.

The full court as been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc are DENIED.



UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GABRIEL RUVALCABA,	) CV90-2797 CBM
	)
Plaintiff,	) JUDGMENT
	)
v.	)
	)
CITY OF LOS ANGELES, et. al.,	)
	)
Defendants.	)
	)

This case having been tried by jury before the Honorable Consuelo Marshall, and the jury having returned a verdict at the conclusion of the case, judgment is hereby entered as follows:

Plaintiff is awarded $60,400 in compensatory damages and $5,000 in punitive damages as to Defendant Martin D. Coon. Plaintiff's claims against the Defendants City of Los Angeles and Daryl Gates are dismissed, because of the jury's responses to the special interrogatories submitted by the Court.

Judgment shall be entered in favor of Defendants Joe Moore and Joel Morales because Plaintiff dismissed these Defendants. Plaintiff's claim against Defendant Dr. Arthur Sakamoto is dismissed because the Court granted Dr. Sakamoto's judgment as a matter of law.

IT IS SO ORDERED.

Dated: 2/8/94 /S/

CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
OCT 15 1999
OFFICE OF THE CLERK

No. 99-47

In The

Supreme Court of the United States

GABRIEL RUVALCABA,

Petitioner,

vs.

CITY OF LOS ANGELES and DARYL F. GATES, Chief of Police, in his personal and official capacity, etc., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES K. HAHN, City Attorney
CECIL W. MARR, Senior Asst. City Attorney
KATHERINE J. HAMILTON, Asst. City Attorney
Counsel of Record
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-7400

Attorneys for Respondents City of Los Angeles and Daryl F. Gates

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

A. THE EVIDENCE IN THIS CASE DOES NOT SUPPORT THE FACTUAL HYPOTHESES UPON WHICH THE QUESTIONS PRESENTED ARE BASED 5

B. THE COURT'S BIFURCATION ORDER IS NOT AN ISSUE IN THIS PETITION AND PETITIONER HAS PROPERLY BEEN LIMITED TO NOMINAL DAMAGES ON REMAND UPON PROOF OF AN UNCONSTITUTIONAL *MONELL* CLAIM 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) 10

City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) 12

DeAnda v. City of Long Beach, 7 F.3d 1418 (9th Cir. 1993) 12

Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971) 11

Hirst v. Gertzen, 676 F.2d 1252 (9th Cir. 1982) 12

Monell v. Dept. of Soc. Serv. of City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 5, 8, 10, 11, 13

Ricciuti v. New York City Transit Authority, 796 F.Supp. 84 (S.D. N.Y. 1992) 12

Wilson v. Layne, ___ U.S. ___, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) 9, 10

STATUTES

28 U.S.C. section 1257(a) 1

JURISDICTION

Respondents City of Los Angeles and Daryl Gates do not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. section 1257(a).

STATEMENT OF THE CASE

Respondents City of Los Angeles and Daryl Gates respectfully submit that the published opinion of the California Court of Appeal contains an accurate description of the proceedings below. Pet. Apx. A3-A6. However, because petitioner has discussed the facts at length, but not always correctly, respondents will provide a brief overview of the case.

Los Angeles Police Officers responded to a radio call that a burglary was taking place at the Mayan Theater at approximately 3:00 a.m. on May 28, 1989. (Supplemental Excerpts of Record on Appeal (hereinafter SERA) 34, 36; II Reporter's Transcript on Appeal (hereinafter RT) 162, 182.) Officer Morales was met by employees of the theater who told him that an ex-employee had locked himself inside the theater, would not come out, had a pipe and was possibly armed with a gun. (SERA 37; II RT 186:13-23.) The officers decided to request the assistance of a canine unit to apprehend the suspect. (SERA 38; II RT 187:1-7.)

Several announcements were made by Officer Morales and Officer Moore in both English and Spanish demanding that the suspect surrender and warning that a canine unit had been summoned. The front doors of the

theater were chained closed but Officer Moore could push them about six to eight inches apart and yelled through the opening into the front of the theater. (SERA 23, 32; II RT 124:1-3; 144:2-6.) He identified himself as a police officer, and stated "I'm calling the dogs, come out before they come." (SERA 23; II RT 124:14-20.) Officer Morales made his announcements in the same manner in Spanish. (SERA 32, 34-35; II RT 144:14-24; 162-163.) After a manager had arrived to open the rear door of the theater, additional announcements, in both English and Spanish, were made from the rear door. (SERA 24; II RT 125:1-4; 145:3-9.)

When Officer Martin Coon arrived with his canine partner, Smokey, he was informed by Officers Moore and Morales that warning announcements had already been made. (SERA 2-4, 27-28; I RT 18-20; II RT 128:24 to 129:8.) Coon entered the theater with the dog through the rear door and did not make any additional announcements of his presence because warnings had already been given and no response had been received. (SERA 51-52, 54; III RT 292-293; 297.) The dog was let off his leash so as not to impair his ability to search (SERA 52-53; III RT 293-294), and Officers Moore and Morales followed Coon into the theater in back-up positions. (SERA 51; III 292:19-22.) In the twenty to thirty minutes the officers were searching the theater, no additional announcements were made or warnings given. (SERA 2; II RT 18:4-8.)

Officer Coon testified that, after searching most of the theater, his dog "alerted" on a portion of the lobby wall. (SERA 53; III RT 294:13-25.) When he noticed a door, he opened it and entered an office, allowing the dog to go in first. (SERA 54; III RT 297.) The office was dark and the

dog approached the suspect who was hiding behind a desk on all fours. (SERA 55-56; III RT 298-299.) The suspect started screaming and lunged at the dog, grabbing him and attempting to throw the dog against the wall. (SERA 57; III RT 300.) In the encounter, the suspect was bitten (SERA 57-58; III RT 300-301), and he fell against the desk striking his chest. (SERA 15; II RT 22:22-25.) Officer Coon called off the dog when the suspect complied with his order to stop fighting the dog. (SERA 58; III RT 301.) The altercation took approximately seven to ten seconds. (SERA 59; III RT 302:10-13.)

Petitioner Gabriel Ruvalcaba testified that he was sleeping on the floor of the theater office when he became aware of a pain in his right leg and woke to find a dog biting him. (ERA 289-8 to 289-9; III RT 21-22.) He sat up and, to defend himself against the biting, stuck his hand in the dog's mouth and tried to bite the dog. (ERA 289-9 to 289-11; III RT 22-24.) The dog continued biting him for five to ten minutes. (ERA 289-13; III RT 26:1-6.) He felt blows to his head and ribs. (ERA 289-10 to 289-11; III RT 23-24.) Appellant never testified that he was kicked by anyone and never identified Officer Coon as the person who struck him.

It is clear from the testimony of all involved that Officer Coon was the only Los Angeles Police Officer in the room with appellant at the time of the encounter between appellant and the dog (SERA 46, 48, 49; III RT 111:3-11; 136; 191), although Coon denied kicking or striking appellant. (SERA 60; III RT 303.) Officer Moore testified that he came into the office to handcuff the suspect. (SERA 29-30; II RT 136-137.) It was dark and he thought the suspect was face down and dropped to his

knee to complete the handcuffing. (SERA 30; II RT 137:1-20.) He realized too late that the suspect was face up and his knee landed in the suspect's right chest area. (SERA 30-31; II RT 137-138.)

Petitioner was initially seen by a doctor at the jail dispensary. Jail records showed that petitioner reported consuming a substantial amount of alcohol the night of the incident – "15 beers and one-fifth of tequila." (SERA 162; III RT 190.) Petitioner was transferred to County General Hospital approximately 36 hours after being taken into custody and was treated for fractured ribs as well as injuries from the dog bites. (SERA 153-155; II RT 224-226.)

Petitioner prevailed in the court below, securing a jury determination on a general verdict that defendant Coon violated his civil rights by using excessive force in arresting him and that this force was the proximate cause of his injuries. (Apx. A7-A8.) In response to special interrogatories, the jury determined that the excessive force used by Coon was not due to the use of his dog, but was due to Coon's having kicked or struck the plaintiff. (Apx. A9-A10.) Petitioner was awarded judgment in the amount of $60,400 in compensatory damages and $5,000 in punitive damages. (ERA 316-317.) The judgment was paid, along with costs, interest and attorney's fees in the amount of $67,088.25. (SERA 140-143.)

REASONS FOR DENYING THE WRIT

This writ should be denied because petitioner's issues do not accurately reflect the evidence presented at trial and do not meet the threshold criteria for certiorari.

A. THE EVIDENCE IN THIS CASE DOES NOT SUPPORT THE FACTUAL HYPOTHESES UPON WHICH THE QUESTIONS PRESENTED ARE BASED.

In the "Questions Presented" portion of petitioner's brief (Petition, p. i), he contends that this Court should grant certiorari to address whether he is entitled to proceed with his *Monell* claim [*Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)] "[w]here a city police officer . . . claims that his conduct was objectively reasonable . . . because he followed city policy and practice . . . ", whether a city police officer should be " . . . permitted to rely on his following city policy or practice to show that his actions were objectively reasonable under the Fourth Amendment . . . ", and whether he should be allowed to show that the city policy and practice is not reasonable where a city police officer " . . . relies on his following city policy and practice to show that his actions were reasonable,. . . . " The evidence in this case does not support these factual hypotheses, however, and the courts below neither addressed nor decided the case based on petitioner's hypothetical factual recitations. The entire evidentiary basis alleged in support of the Petition is therefore unsound, and a grant of certiorari would not be appropriate.

Petitioner argues that Officer Coon was allowed to mount a "following orders" defense and to assert that he was acting in accordance with departmental policy. The flip side of this argument is petitioner's contention that he should have been permitted to challenge Coon's "policy defense" with evidence critical of the City's policies. This argument misstates the nature of the evidence which was proffered by defendants.

Petitioner was unable to cite any place in the evidentiary record where Coon attempted to excuse his conduct or disclaim responsibility for his decisions based on a superior's orders. The majority of references to the record highlighted in the Petition focus on testimony concerning the making of warning announcements before a search was commenced. Many of the "policy" references were solicited by petitioner on his counsel's examination, and many others, to the extent they discuss "policy," refer to general concepts applicable to canine searches rather than hard and fast policies directing a particular course of conduct.

Petitioner asserted that the "following orders" defense was presented through Deputy Chief Mark Kroeker who was called as a witness by petitioner and questioned regarding the City's use of force policy and whether or not deployment of canines was considered, or should be considered, a use of force. (II RT 55-78.) He was not asked whether Coon should be exonerated because he was following departmental policy at the time of this incident and did not comment on the events surrounding petitioner's arrest.

Petitioner asserted that the "following orders" defense was also presented through Sergeant Donn Yarnall who was the chief trainer for the canine platoon and was responsible for the creation of the unit. (SERA 76-79; IV RT 46-49.) Petitioner examined Coon and the other police officers present at the scene extensively on the question of whether and when announcements or warnings were given before deployment of the dog to search for petitioner. (SERA 1-4, 6-13, 16-18, 23-28, 32-35, 39; I RT 17-20; II RT 13-20, 107-109, 124-129, 144-145, 162-163, 188.) When Coon testified on his own behalf, petitioner's cross-examination elicited the first reference to policy or practices. Petitioner asked Coon: "Was it your practice to make an announcement before commencing a search for a person?" (SERA 61; IV RT 12:7-8.) The officer replied that it was up to the discretion of the handler, "as our policy dictated." (SERA 61; IV RT 12:13-16.) Coon was quizzed about his practice of making announcements when the suspect to be sought was believed to be armed. (SERA 62-72; IV RT 13-23.) Coon was asked whether it was important to record in his reports whether he had made an announcement and whether he had been instructed that he was to record those facts which would enable his supervisor to evaluate whether he had used his dog in accordance with departmental guidelines and policies, to which the officer responded affirmatively. (SERA 74-75; IV RT 25-26.)

When Yarnall was later called to testify, he was asked whether departmental policies concerning making warning announcements prior to a search left such matters up to the officer's discretion. (SERA 80-81; IV RT 58-59.) This testimony was clearly sought as a response to petitioner's

emphasis on the entire issue of warning announcements, and no evidence was adduced to the effect that Coon's conduct was proper because he had followed departmental policy. Petitioner also cited other testimony from Yarnall in support of his contention that a "following orders" defense was mounted, but the record does not support this contention. Brief references to what normally happens at the scene of a search (ERA 289-25; IV RT 66), the use of patrol officers as back-up during the search (ERA 289-27; IV RT 71), whether the canine officer or the patrol officer is considered to be in charge of the search (SERA 82; IV RT 72), the fact that the handler directs the search by the dog (ERA 289-28; IV RT 73), and the practice of taking the dog off the leash (ERA 289-29; IV RT 74), do not amount to a "policy" defense attempting to excuse the officer's conduct. Neither were the policies themselves defended and no opinion was offered whether they were appropriate or proper or constitutional. Instead, the defendants' testimony simply attempted to explain to the jury what had happened at the scene and why.

In contrast, the evidence which petitioner sought to have admitted went directly to the issue of the municipal defendants' *Monell* liability and was properly excluded from the liability phase of the trial. Evidence of Coon's "bite rate" or the rate of hospitalizations for persons arrested by the canine unit as opposed to arrests by other units may have been relevant to support the contention that the City's policies allowing deployment of police dogs were unconstitutional, but it was not relevant to the issue of whether excessive force was used to secure petitioner's arrest.

Attempting to unravel the logic chain of petitioner's argument, respondent believes the argument is essentially a camouflaged complaint that references to City canine policies constituted an improper qualified immunity defense. Coon's motion for judgment on qualified immunity was denied by the court, however (SERA 86-93d; V RT 49-60), and no argument or instruction was presented to the jury which would have allowed them to conclude that the officer would be immune for using excessive force because his dog seized petitioner in a manner consistent with City canine policies.

Petitioner's reliance on *Wilson v. Layne*, ___ U.S. ___, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), is unhelpful. Petitioner contends that *Wilson* supports his argument that the jury may have interpreted Coon's "just following orders" defense to conclude that his conduct was constitutionally reasonable. (Petition, pp. 10-11) Leaving aside for the moment the question of whether the evidence actually supports the factual basis of this argument, *Wilson* cannot be read to say that presentation of evidence that a police officer's conduct was consistent with departmental policies is equivalent to presentation of a qualified immunity defense. (Petition, p. 11) Rather, *Wilson* simply determined that the officers in that case were entitled to qualified immunity because the law on third-party entry into homes with police officers was not clearly established. *Wilson v. Layne, supra* at 119 S.Ct. p. 1700.

The factors which this Court considered in determining whether the law was clearly established included the fact that the constitutional question was not "open and shut", there were no judicial opinions holding the practice unlawful, and both federal and state law enforcement

units had policies allowing third parties to enter private homes with police. *Id.* at 119 S.Ct. pp. 1700-1701. The Court then opined that a law enforcement officer's acts in furtherance of departmental policy would not make his conduct "objectively reasonable" (i.e., he would not be entitled to qualified immunity) if the conduct was contrary to a decided body of case law. *Id.* at 119 S.Ct. p. 1701. That is clearly not the situation in the case at bar since *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), decided many years after the incident in this case occurred in 1989, determined that the law simply was not clearly established that L.A.P.D. policies regarding the use and training of police dogs contravened a suspect's constitutional rights. *Id.* at 27 F.3d pp. 1448-49.

Ultimately, the entire argument that Coon mounted an improper defense was proved moot in light of the fact that the jury returned a verdict in petitioner's favor and found that Coon violated his constitutional rights. Moreover, the Ninth Circuit agreed that petitioner should have been permitted to proceed with his *Monell* claim in spite of the jury's answer to the special interrogatory. The court determined that petitioner should be allowed to attempt to prove that Coon's actions in using excessive force against petitioner were in furtherance of the City's dog-bite policy. (Apx. A19) All of the evidence concerning bite rates, and hospitalizations, etc., will in all probability be admissible during this portion of the case.

In short, then, this case does not identify any issues appropriate for resolution by this Court on certiorari. The factual predicate for the questions posed by petitioner is not demonstrated by the record of evidence adduced below and reviewed by the Ninth Circuit. Even if one can

say that the parties differ with regard to their interpretation of testimony below, questions concerning the persuasiveness and substantiality of the evidence do not constitute an "important federal question" justifying this Court's review on certiorari. *Donaldson v. United States*, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed.2d 580 (1971). For this reason alone, the issue is unworthy of review. And, finally, the ultimate remedy sought by petitioner, the opportunity to continue his case and to prove that the city dog-bite policy caused his injury, has been granted by the Ninth Circuit. The case has been remanded to the district court and petitioner is pursuing his *Monell* cause of action. Accordingly, certiorari should be denied.

B. THE COURT'S BIFURCATION ORDER IS NOT AN ISSUE IN THIS PETITION AND PETITIONER HAS PROPERLY BEEN LIMITED TO NOMINAL DAMAGES ON REMAND UPON PROOF OF AN UNCONSTITUTIONAL *MONELL* CLAIM.

Petitioner complains that the bifurcation of the issue of liability from the *Monell* cause of action in the trial court, and the finding on the special interrogatory that the use of the dog was not excessive force, improperly prevents him from recovering anything more than nominal damages against the City of Los Angeles if he proves his *Monell* claim on remand. (Apx. A20-21) However, the "Questions Presented" portion of the Petition does not pose any issue with regard to the practice of bifurcation. Petitioner's concluding argument that the practice of

bifurcation has diluted a jury's "constitutional reasonableness" inquiry and has insulated Fourth Amendment seizures from scrutiny is therefore not only unfounded but not appropriate for review on certiorari in this case. (Petition, pp. 12-14) Quite simply, this is the wrong case to serve as a vehicle for such an inquiry.

Petitioner attacked the practice of bifurcation below without success. Bifurcation is appropriate if it simplifies issues for the jury or avoids unnecessary jury confusion. *Hirst v. Gertzen*, 676 F.2d 1252, 1261 (9th Cir. 1982). Convenience and judicial economy alone justify bifurcation. *Ricciuti v. New York City Transit Authority*, 796 F.Supp. 84, 86 (S.D. N.Y. 1992). A court's decision to bifurcate issues and order separate trials may be reversed only for an abuse of discretion. *DeAnda v. City of Long Beach*, 7 F.3d 1418, 1421 (9th Cir. 1993). The Ninth Circuit below did not address this allegation of error by petitioner and, impliedly, found no abuse of discretion in the bifurcation order made here.

Moreover, as explained above, the record does not support the assertion that Officer Coon ever claimed, either expressly or by "obvious implication," that his use of the dog to search for petitioner, or his conduct once petitioner was found, was "objectively reasonable." The jury was not instructed on the issue of qualified immunity and cannot be presumed to have ignored their instructions [*City of Los Angeles v. Heller*, 475 U.S. 796, 798, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)] and found the use of the dog to seize petitioner not unreasonable simply because Officer Coon was a member of a "paramilitary organization" and expected to act in accordance with his training. (Petition, p. 14)

Petitioner's contention ultimately founders on the rock of the jury's finding of liability against Officer Coon. The jury was asked by general verdict whether Officer Coon violated petitioner's constitutional rights by using excessive force and the jury answered "yes." Although the court sought, by use of the special interrogatory, to foreclose further litigation on petitioner's *Monell* claim by determining whether the jury had made any distinction between the force which broke petitioner's ribs and the dog bites, the Ninth Circuit determined that the dismissal of the *Monell* claim was error and petitioner is even now prosecuting that cause of action. Whether petitioner has been prevented, by that error, from recovering damages for his injuries caused by the dog attack is moot in light of the fact that he has been fully compensated for all of his injuries and is not entitled to double recovery.

In the trial court, petitioner argued to the jury that he should be awarded $32,000 ($8,000 a year times four years) for lost earnings and injury to his ability to be self-supporting, and $75,000 ($5,000 a year times 15 years of earning capacity) for pain and suffering and the loss of self sufficiency. (SERA 144-146; X RT 170-172.) The injuries for which petitioner wished to be compensated, therefore, were "general" in the sense that they were not limited to only those injuries, or portions of injuries, attributable to the officer's tort as opposed to the dog bite. The jury eventually awarded him $60,400 in compensatory damages (ERA 316), almost two-thirds of what he asked for, as well as $5,000 in punitive damages.

Petitioner was allowed to and did put on all damages evidence he possessed concerning the injuries he received during the encounter with Officer Coon and the police

dog. No attempt was made, either in the presentation of evidence, instructions to the jury, or argument by any counsel, to separate petitioner's injuries or to require the jury to apportion its award between damages attributable to the officer personally and those attributable solely to dog bites. Petitioner has presented no authority, either below or in this Petition, which would support his contention that he should be allowed to prove and recover additional damages (other than nominal damages) from the City if he establishes that the City's dog bite policies caused or contributed to the use of excessive force by Officer Coon. The unavailability of additional damages on remand presents no issue justifying review by this Court, and the Petition should be denied.

CONCLUSION

For all of the above reasons, the petition for certiorari should be denied.

DATED: October 13, 1999

Respectfully submitted,

JAMES K. HAHN, City Attorney
CECIL W. MARR, Senior Assistant City Attorney
KATHERINE J. HAMILTON, Assistant City Attorney
Counsel of Record
200 North Main Street
1700 City Hall East
Los Angeles, California 90012-4131
(213) 485-7400 – Phone
(213) 847-0400 – Fax

Attorneys for Respondents City of Los Angeles and Daryl F. Gates

(3)

Supreme Court, U.S.
FILED
OCT 26 1999
OFFICE OF THE CLERK

No. 99-47

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

GABRIEL RUVALCABA
Petitioner,

vs.

CITY OF LOS ANGELES and *DARYL F. GATES*, Chief of Police, in his personal and official capacity etc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR PETITIONER
3435 Wilshire Boulevard, Ste. 2900
Los Angeles, CA 90010
(213) 252-9444

9 pp

QUESTIONS PRESENTED

1. Where a city police officer, in a "bifurcated" trial, claims that his conduct was objectively reasonable under the Fourth Amendment because he followed city policy and practice, and the jury returns a verdict in favor of the officer, is the plaintiff entitled to go forward on his *Monell* claim against the entity, and to prove that the policy or practice the officer relied on is unconstitutionally unreasonable?

2. Should a city police officer, in a "bifurcated" trial, be permitted to rely on his following city policy or practice to show that his actions were objectively reasonable under the Fourth Amendment?

3. Where a city police officer, in a "bifurcated" trial, relies on his following city policy and practice to show that his actions were reasonable, should the plaintiff be permitted to show that city policy and practice is not reasonable?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

I. CONTRARY TO RESPONDENTS' CLAIM, THE RECORD CLEARLY ESTABLISHES THAT PETITIONER HAS NOT BEEN AND WILL NOT BE COMPENSATED FOR HIS DOG BITE INJURIES IF THE NINTH CIRCUIT'S DECISION IS ALLOWED TO STAND. 1

II. THE PETITION DOES NOT SEEK OR REQUIRE THE RESOLUTION OF DISPUTED FACTS; ONLY AN ISSUE OF LAW IS RAISED. 4

III. CONCLUSION. 5

TABLE OF AUTHORITIES

Page(s)

Cases

City of Los Angeles v. Heller,
475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) 3, 5

Fagan v. City of Vineland,
22 F.3d 1283 (3rd Cir. 1994) 6

Merchants' National Bank v. Richmond,
256 U.S. 635, 41 S.Ct. 619 (1920) 5

Ruvalcaba v. City of Los Angeles,
167 F.3d 514 (9th Cir. 1999) 2, 3

Wilson v. Layne,
___ U.S. ___, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) . 4

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

GABRIEL RUVALCABA

Petitioner,

vs.

CITY OF LOS ANGELES and *DARYL F. GATES*, Chief of Police, in his personal and official capacity,

Respondents.

I. CONTRARY TO RESPONDENTS' CLAIM, THE RECORD CLEARLY ESTABLISHES THAT PETITIONER HAS NOT BEEN AND WILL NOT BE COMPENSATED FOR HIS DOG BITE INJURIES IF THE NINTH CIRCUIT'S DECISION IS ALLOWED TO STAND.

A central tenet in respondents' opposition is that petitioner has been "fully compensated for *all* of his injuries" (emphasis added). Hence, even if the dog handler Coon did rely on a following policy defense, the issue became moot given the jury's award of damages and the Ninth Circuit's disposition. Opposition brief, pp. 10, 13-14.[1]

---

[1] For example, respondents argue:

> Ultimately, the entire argument that Coon mounted an improper defense [of following policy] was proved moot in light of the fact that the jury returned a verdict in petitioner's favor and found that Coon violated his constitutional rights.

Inexcusably, respondents misstate the record. Petitioner has *not* been "fully compensated for this injuries"; he was *never* awarded *any* damages for his police dog bite injuries, a fact that the Ninth Circuit readily acknowledged. The $65,400 damages award was for injuries caused by Coon kicking and hitting petitioner *only*:

> We note that Ruvalcaba's victory may be a hollow one because on remand, he may no longer seek compensatory damages. Such damages are unavailable because Ruvalcaba has already been fully compensated for his injuries attributable to Officer Coon's kicks and blows. *No compensatory damages were awarded for Ruvalcaba's dog bite injuries because the jury found that they did not result from the use of excessive force.* The fact that Officer Coon's kicking may have been the result of an unconstitutional dog-bite policy does not change the jury's finding, and would not justify allowing additional damages for the dog bites.
>
> * * * *
>
> Here, it was clear from the jury's answers to the special interrogatories that the jury awarded damages to Ruvalcaba only for his kicking injuries because only the kicks constituted the excessive force.

Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 524 (9th Cir. 1999) (see Petition for Certiorari, Apx. A20) (emphasis added).

Thus, had the court of appeal agreed with petitioner that the

---

Opposition brief at 10.

verdict in Coon's favor on the release of the dog could not exonerate respondents (because Coon asserted a following policy defense), on remand petitioner could seek additional compensatory damages against respondents. The Ninth Circuit's remand, however, does not permit recovery for the dog bite injuries because, even though petitioner contended that Coon asserted a following policy defense and respondents were responsible for that policy, this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986), requires that respondents escape liability for the dog bite injuries:

> [Ruvalcaba] argues that the special interrogatories did not decide the issue whether he suffered constitutional injuries due to Officer Coon's use of his dog, because the jury might have found Officer Coon's actions reasonable because he was following departmental policy. The Supreme Court, however, has flatly rejected such an argument . . .
>
> In this case, as in *Heller*, the jury was not instructed on qualified immunity or good faith, and is presumed not to have based its decision that Officer Coon's use of the dog did not constitute excessive force on those grounds. *Id.*

Ruvalcaba, *supra*, 167 F.3d at 523 (see Petition for Certiorari, Apx. A18-A19).

If, as petitioner contends, the Ninth Circuit has mis-read *Heller* (Petition for Certiorari, pp. 9-13), then petitioner may seek compensation from the City and Gates for the dog bite injuries. Rather than making the issue moot, the court of appeal's disposition (remanding case but precluding recovery for the dog bite injuries) makes ripe the issues petitioner raise.

II. THE PETITION DOES NOT SEEK OR REQUIRE THE RESOLUTION OF DISPUTED FACTS; ONLY AN ISSUE OF LAW IS RAISED.

Petitioner's central thesis is that a municipality and its policymaker should not escape liability for a constitutionality-defective policy because their subordinate employee, after defending his conduct on grounds he did what he was trained to do, was exonerated. While one who follows policy may be forgiven for that reason, e.g., *Wilson v. Layne*, ___ U.S. ___, 119 S.Ct. 1692, 1700, 143 L.Ed.2d 818 (1999), that ought not to shield those who set the policy.

Respondents do not contest the merits of that proposition. Rather, they insist that the "evidence in this case does not support" petitioner's "factual hypothesis," *i.e.*, that Coon defended his release of the dog on grounds it was in accordance with respondents' policy. E.g., Opposition brief, pp. 5-6. Respondents then offer a self-serving and inaccurate summary of the facts as if it proves Coon did not defend his conduct on grounds his release of the dog was in accordance with LAPD policy. Opposition brief, pp. 1-4, 6-8.

It is unnecessary for this Court to decide whether respondents have fairly summarized the record (they have not[2]). The core issue is

---

[2] For instance, the jury quite plainly disbelieved Coon's claim that he did not kick or hit petitioner, concluding instead that he had and had done so maliciously – jury awarded damages after finding that Coon had either kicked or struck petitioner, an award that included $5,000 in *punitive* damages. *Ruvalcaba*, 167 F.3d at 519-20. This verdict was also a rejection of the claim that another officer accidently injured petitioner by landing on him with his knee. Opposition brief, pp. 3-4.

Respondents' assertion that Coon did not rely on a following policy defense, Opposition brief at 6-7, finds no support in the Ninth Circuit's decision. No where in its opinion does that court suggest that Coon did not rely on following policy defense. Furthermore, the trial judge explicitly acknowledged that Coon was relying on a following police defense. In discussing petitioner's proposed jury instruction which would have precluded Coon from justifying his conduct on

a strictly a legal question, to wit: are municipal policymakers, based on *Heller*, shielded from liability where the officer defends his conduct by claiming he did what the policymakers trained him to do? The Ninth Circuit said yes. If the court of appeals was wrong, it made an error of law. In that case, this Court's procedure is to resolve the legal question and remand to the lower court to apply the law to the case's facts. *Merchants' National Bank v. Richmond*, 256 U.S. 635, 638, 41 S.Ct. 619 (1920) (Court holds that it would address the legal question even though the lower courts had not passed upon the evidence or made factual findings; Court decides the legal question, reverses judgment and remands for further proceedings). In that event, respondents will be free to convince the court of appeals that Coon did not invoke a following policy defense.

III. CONCLUSION.

The petition raises an important and fundamental question. May policymakers escape a jury's scrutiny because it concludes the officer acted reasonably by following the policymakers' policy? The Ninth Circuit says yes. That, petitioner submits, offends basic notions of fairness and will probably insure immunity for policymakers in bifurcated cases:

> If we conditioned municipal liability on an individual police officer's liability in every case, it might lead to illogical results. A municipality would escape liability whenever the conduct of the acting police officer did not meet the "shocks the conscience" standard, even though municipal policymakers, acting with deliberate indifference or even malice,

---

grounds he followed department policy, the trial court stated: ***"there is certainly evidence in the record that would support the giving of such an instruction if it's a correct statement of the law . . . ."*** RT V-149:4-10.

> implemented a policy which dictated his injury-causing actions. It is easy to imagine a situation where an improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because his conduct did not "shock the conscience." It does not follow, however, that the city should also escape liability. The city causes the officer to deprive the plaintiff of his liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights.

Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3rd Cir. 1994).

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioner